Filed 5/7/19 Berry & Berry v. Madera Hotel CA5



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

BERRY & BERRY, INC.,

Plaintiff and Respondent,

v.

MADERA HOTEL LLC,

Defendant;

KANWAL J. SINGH,

Intervener and Appellant.

F075645

(Super. Ct. No. MCV062748)

**OPINION**

APPEAL from a judgment of the Superior Court of Madera County. Michael J. Jurkovich, Judge.

Doerksen Taylor Stokes, Charles L. Doerksen and Travis R. Stokes for Defendant, Intervener and Appellant.

Wanger Jones Helsley, Kurt F. Vote and Micaela L. Neal for Plaintiff and Respondent.

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After a construction company finished building a hotel and restaurant, it sued the hotel owner for breach of contract claiming an additional $2.7 million was owed under the construction agreement. The entity that owns the hotel and restaurant building is a

limited liability company formed by the principal of the construction company and a doctor, each holding a 50 percent membership interest. The dispute over the cost of construction was tried before a referee (Referee) who found there was a valid contract, part written and part oral, and awarded damages of $2.2 million. The damages related to work not included in the original estimate of the construction cost, such as the separate building for the restaurant and the addition of a fourth floor and functional balconies to the hotel. The Referee also awarded prejudgment interest under the statute that requires such an award on damages that are "certain, or capable of being made certain by calculation." (Civ. Code, § 3287, subd. (a).) This appeal challenges both the determination of liability for breach of contract and the award of prejudgment interest.

First, we uphold the determination of liability because the Referee did not err in deciding the parties formed an enforceable construction contract with a cost-plus pricing term. Substantial evidence supports the Referee's finding that the doctor waived the provision in the limited liability company's operating agreement that required the unanimous written consent of the members to authorize a contract with an entity (like the construction company) controlled by one of the members.

Second, the amount owed under the construction contract does not qualify as liquidated damages because the Referee, sitting as the trier of fact, was required to determine which adjustments to the $2.7 million claimed in the complaint and opening trial brief were appropriate. Those adjustments, which totaled nearly half a million dollars, were not capable of being made certain without the Referee's findings of fact. Therefore, the construction company was not entitled to *mandatory* prejudgment interest under Civil Code section 3287, subdivision (a). However, the Referee's alternate determination, that prejudgment interest was appropriate under the *discretionary* provision set forth in Civil Code section 3287, subdivision (b), is adequately supported by his findings of fact and legal analysis, which appellant has not challenged. Thus,

prejudgment interest should run from the filing of the complaint on March 19, 2013, not the earlier date of February 7, 2012.

We therefore reverse the judgment in part and remand for a modification of the award of prejudgment interest.

## FACTS

David L. Berry and Kanwal J. Singh, M.D., met as members of the board of Madera Community Hospital. In 1999, they jointly acquired a parcel located next to State Route 99 and across from Madera Community Hospital. In 2005, David Berry finished building Dr. Singh an office on leased land that was part of the hospital's campus. Dr. Singh testified they did not need a contract for the office because David Berry already had built two offices and they used the same plans with slight modifications. Dr. Singh testified David Berry estimated the cost at between $100 and $115 per square foot and the final cost was a bit more but in that ballpark.

In May 2007, David Berry and Dr. Singh signed an agreement to construct a motel and restaurant complex on their parcel across from the hospital. In September 2007, David Berry submitted a franchise application and fee to Marriott International, Inc. The application stated the documents creating a limited liability company were being processed.

On November 28, 2007, the operating agreement for defendant Madera Hotel, LLC, a California limited liability company (LLC), was signed by Dr. Singh, David Berry, and his wife Patricia Rea Berry. David Berry and his wife signed in their capacities as trustees of the David and Patricia Berry Living Trust (Berry Trust), which owns a 50 percent membership interest in the LLC. Dr. Singh owns the other 50 percent membership interest. The LLC was formed to develop, own and operate the hotel and to construct and lease out the restaurant facility. The operating agreement named David Berry as the LLC's managing member and required the unanimous written consent of the members for certain types of transactions.

In December 2007, after the LLC's articles of organization were filed by the Secretary of State, David Berry and Dr. Singh signed a deed transferring the real estate to the LLC. Effective January 14, 2008, the LLC and Marriott International, Inc. entered into a Springhill Suites by Marriott Franchise Agreement pursuant to which the LLC agreed to operate the proposed hotel in accordance with the standards and specifications set forth in the agreement.

*Design and Construction Agreement*

David Berry and Dr. Singh agreed to use David Berry's construction company, plaintiff Berry & Berry, Inc. (Berry Construction), to design and build the hotel. Berry Construction and the LLC agreed to a document labeled "UNDERSTANDING AND AGREEMENT TO DEVELOP AND CONSTRUCT A HOTEL" and dated January 25, 2008. Todd Phillips, the project manager and a grandson of David Berry, signed the document on behalf of Berry Construction and dated his signature April 1, 2008. David Berry signed on behalf of the LLC and dated his signature April 3, 2008. He did not obtain the unanimous written consent of the members of the LLC to enter into the agreement. The Referee[1] found the document was "the only written agreement signed by the LLC and [Berry Construction] for the construction project." The document's seven sentences stated:

> "We mutually agree to construct and manage the design criteria to be drawn by Berry & Berry Inc. This facility is to be used for a hotel known as SpringHill Suites by Marriott. [¶] BERRY shall furnish all expertise and knowledge to plan and assist the owners to build an eighty eight guest room hotel. [¶] BERRY shall furnish an estimate of $8,217,963.00 (attached hereto as Exhibit 'A') to the owners for their discretion and selection of building their facility. [¶] BERRY and owners will work in concert and unison toward the completion of this project. [¶] We are committed to

[1] The matter was tried by a retired judge who, in accordance with the parties' stipulation, was appointed the Referee by the superior court pursuant to Code of Civil Procedure section 638.

assist the owner in building a facility at the best possible cost for value received. [¶] Time is of the essence."

The three-page exhibit listed over 110 items and provided an estimate of each item's cost. For example, the sixth item was "02210 Grading & Paving" and the amount was $382,000. "05102 Elevator Hoist Beam" was estimated at $1,250 and "06100 Framing" at $1,081,161. No amount was entered on the lines for "Overhead" and "Profit." The hard cost subtotal was $8,052,780. With liability and course of construction insurance added, the total was $8,217,963.

The document's brevity caused the Referee to find "most of the important things pertaining to the agreement are not in writing." The Referee also found the dollar figures in the attachment were estimates and related only to the hotel (i.e., they did not include the restaurant part of the project). Under the agreement, the design process was part of what the LLC engaged Berry Construction to do. As a design-build project, the absence of a completed design allowed the owners to customize the hotel. To illustrate this flexibility, the Referee mentioned the addition of functional exterior balconies to enhance the hotel's aesthetics and the addition of a fourth floor containing suites for Dr. Singh and Mr. Berry.

The Referee found the parties did not agree in advance on the final cost of the project. Instead, they agreed Berry Construction would be paid on a modified cost-plus basis.[2] Under that arrangement, Berry Construction was to be paid for all costs incurred in connection with the project, including burden on labor for work actually provided, but without charges for home office overhead and profit.

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[2] In some construction contracts, "the owner agrees to pay the contractor whatever it costs to complete the improvements. In such cases, the contract price may be described as the contractor's costs of construction plus an amount for his or her profit and overhead, stated either as a percentage of the costs or as a specific sum. This type of formula is commonly called a cost-plus contract." (9 Miller & Starr, Cal. Real Estate (4th ed. 2018) § 31:87, pp. 31-363 to 31-364, fns. omitted; Black's Law Dict. (8th ed. 2004) p. 344 [definition of cost-plus contract]; see 2 Bruner & O'Connor, Construction Law (2018) § 6:81 [cost plus fee construction contracts].)

The Referee found the written document signed by the LLC and Berry Construction was a contract that was amended later to expand the scope of the work for the project. The amendments were not written. Instead, the parties orally agreed to additional work during the course of construction. The written agreement did not require any amendments to be in writing and, therefore, the oral modifications were not contrary to the written terms of the agreement.

*Construction Loan*

Site work and staking started in late 2007 and building permits were issued in the spring of 2008. On May 27, 2008, the LLC obtained a construction loan from Citizens Business Bank (Bank) for $8,050,000 to provide a portion of the cost of building the hotel. The construction loan agreement and related promissory note were signed by David Berry as manager of the LLC and by Dr. Singh as a member of the LLC. The loan's maturity date was November 27, 2009, and it was guaranteed by Berry Trust and Dr. Singh.

The loan documents included an "ASSIGNMENT OF CONSTRUCTION CONTRACTS." Near the top of the document, the LLC was identified as "Borrower," the Bank as "Lender," and Berry Construction as "Contractor." The document's third paragraph stated the LLC assigned Bank all of the LLC's present and future rights, title and interest in the contract between the LLC and Berry Construction dated January 25, 2008, including all amendments relating thereto. Like the loan agreement and promissory note, the assignment was signed by David Berry as manager of the LLC and by Dr. Singh as a member of the LLC. Dr. Singh testified that when he signed the document he did not ask for a copy of the contract being assigned.

In connection with obtaining the construction loan, David Berry, Patricia Berry and Dr. Singh signed a letter of understanding prepared on Bank letterhead. The opening sentence of the letter referred to "a loan in the amount of $8,050,000 (hereinafter loan) to complete the construction of a 88 room hotel located in Madera, CA." The letter also (1)

stated how the $8,050,000 in loan proceeds would be disbursed, (2) listed the borrower's prepaid costs as $2,505,274, and (3) stated the total cost was $10,555,274. The letter addressed the possibility of increased costs by stating "Borrower acknowledges and understands that all cost overruns will be paid directly by borrower." The letter did not mention a restaurant.

The letter stated Bank had approved one six-month extension upon payment of a 0.25 percent fee, and Bank agreed to fund a permanent real estate loan to the LLC, secured by a first deed of trust on the property, if certain conditions were met.

*Changes to the Project*

The Referee found changes were made to the project during construction that increased its cost. The Referee found Dr. Singh knew of numerous substantive changes to the project, including (without limitation) a concrete parking lot instead of asphalt, a single-ply roof instead of a built-up roof, a fourth floor, furnishing the hotel as a "Generation 4" hotel,[3] adding exterior balconies, and adding the restaurant shell and tenant improvements to the project. The Referee determined the amount owed to Berry Construction was $10,395,123.82, of which $8,131,568 had been paid by the LLC.

The Referee found the total adjusted costs incurred by Berry Construction for the hotel were $9,388,028 and the restaurant shell and the tenant improvements cost $403,892.03 and $532,562.17, respectively. The construction loan and initial funding of the LLC was insufficient to cover the construction and start-up cost. As a result, the LLC required additional funding to complete the expanded scope of work and remain operational. When the need for additional funding was brought to Dr. Singh's attention and he was asked to contribute 50 percent of the funds needed to complete the hotel, Dr.

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[3] A May 7, 2009, letter from David Berry to Dr. Singh stated Marriott should require the hotel to upgrade its "furniture, fixtures and equipment from a generation three to a generation four plan in three to four years. With this in mind, the decision to upgrade now was made to prevent future upgrades totaling approximately $1,000,000.00"

Singh refused to provide any funds to the LLC, claiming he was financially unable to do so. At that time, Dr. Singh never disputed that the members of the LLC should provide the necessary funding to the LLC. To keep the LLC operational, Berry Trust provided it with seven checks totaling $1,352,000.

*Construction Loan Take-Out*

On November 27, 2009, the construction loan became due and payable. Bank extended the construction loan three times—first, from November 27, 2009, to May 27, 2010; second, to August 27, 2010; and third, to October 27, 2010. When the LLC sought to convert the construction loan to a permanent loan, Bank required the LLC to pay down the balance of the loan to achieve a 50 percent loan-to-value ratio. In the fall of 2010, the hotel and restaurant were appraised at $10 million. Based on this appraisal, Bank required the LLC to pay down the construction loan to $5 million. At the time, the LLC lacked the funds to pay down the construction loan, and Dr. Singh was asked to contribute 50 percent of the needed funds. Again, Dr. Singh refused to participate on the ground he was financially unable to do so.

Berry Trust provided the funds to pay down the construction loan and replace it with another loan from Bank. The new loan was dated October 27, 2010, was for $5 million, and had a balloon payment at the end of its five-year term. The claims of Berry Trust for the repayment of the funds provided to complete the construction and to pay down the construction loan is the subject of a separate lawsuit and appeal between Berry Trust and the LLC, with Dr. Singh appearing as an intervenor on behalf of the LLC. (Case No. F075618.) The parties refer to that case as the "Loan Case" and this case as the "Construction Case."

**PROCEEDINGS**

In March 2013, Berry Construction sued the LLC for damages for breach of the construction contract and common counts. The complaint alleged Berry Construction had been paid $8,131,567.30, leaving a balance of $2,758,937.42 due as of July 1, 2009.

In May 2013, Dr. Singh filed a complaint in intervention and requested "an order staying this action pending the resolution of mediation/arbitration." The superior court granted Dr. Singh leave to intervene.

On November 26, 2013, pursuant to the parties' stipulation, the superior court appointed a retired judge as Referee pursuant to Code of Civil Procedure section 638. The stipulation and order directed the Referee to hear, try and determine all the issues of fact and law in the Loan Case and the Construction Case. It also provided for the bifurcation of all issues relating to statute of limitations defenses asserted in the two cases.

From January 9 through 11, 2017, the matter was tried before the Referee. In April 2017, the Referee issued a written decision setting forth the factual and legal bases for his determinations. The Referee found for Berry Construction on its breach of contract claim and awarded damages of $3,420,139.82, which included an award of prejudgment interest at the rate of 10 percent. The Referee concluded it was not necessary to resolve Berry Construction's quantum meruit cause of action. The Referee rejected Dr. Singh's claims that the various claims failed because of specific restrictions on contracting set forth in the LLC's operating agreement. The Referee found Dr. Singh's conduct constituted a waiver of the provision requiring the prior written unanimous consent of the LLC's members, Dr. Singh was estopped from asserting lack of compliance as a defense, and Dr. Singh ratified the contract between the LLC and Berry Construction.

On April 14, 2017, the superior court entered judgment based on the Referee's written decision. Dr. Singh timely appealed.

## DISCUSSION

I. BASIC LEGAL PRINCIPLES

A. Standard of Review

A decision reported by a referee pursuant to a voluntary general reference under Code of Civil Procedure section 638 is subject to the same standards of appellate review applied to a statement of decision issued by a superior court after a bench trial. (*Central Valley General Hospital v. Smith* (2008) 162 Cal.App.4th 501, 513.) Accordingly, we apply the substantial evidence standard of review to the Referee's findings of fact and independently review the Referee's resolution of questions of law. (*Ibid*.)

B. Breach of Contract

A breach of contract claim requires proof of "(1) the existence of the contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) the resulting damages to the plaintiff." (*Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 821.) The existence of an enforceable contract requires (1) "[p]arties capable of contracting," (2) consent from those parties, (3) a lawful objective, and (4) sufficient consideration. (Civ. Code, § 1550.) The consent of the parties to a contract must be free, mutual, and communicated by each to the other. (Civ. Code, § 1565; see Civ. Code, § 1581 [communication of consent].)

"Mutual assent is determined under an objective standard applied to the outward manifestations or expressions of the parties, i.e., the reasonable meaning of their words and acts, and not their unexpressed intentions or understandings. [Citation.] Mutual assent is a question of fact." (*Alexander v. Codemasters Group Limited* (2002) 104 Cal.App.4th 129, 141 (*Codemasters*).)

C. Oral Amendments

Under California law, the terms of a contract may be stated in words or manifest by conduct. (Civ. Code, §§ 1619, 1620 [express contract], 1621 [implied contract].) The words of an express contract may be stated orally or in writing. (Civ. Code, § 1622 [oral

contracts].) Here, the Referee found the contract between the LLC and Berry Construction consisted of a written document and subsequent oral amendments.

The rules for modifying a written agreement are stated in Civil Code section 1698. Subdivision (b) of that section states "[a] contract in writing may be modified by an oral agreement to the extent that the oral agreement is executed by the parties." Subdivision (c) of that section provides that a written contract may be modified by an oral agreement supported by new consideration, unless the contract expressly prohibits oral modifications.

Owners often request changes in the plans and specifications for a project after the parties have executed the construction contract. (9 Miller & Starr, Cal. Real Estate, *supra*, § 31:51, p. 31-252.) Usually, the changes are accomplished by written change orders. (*Ibid*.) "It is not uncommon, however, for the parties to make changes during the course of construction, and in many instances these changes are made by oral agreements. If the contractor performs the change based on an oral agreement, the modification is 'executed' and the change enforceable against the owner." (*Id.* at p. 31-253, fns. omitted; see *D. L. Godbey & Sons Const. Co. v. Deane* (1952) 39 Cal.2d 429, 433–434; *Sanders Constr. Co. v. San Joaquin First Fed. Sav. & Loan Assn.* (1982) 136 Cal.App.3d 387, 396–397 [contractor fully performed oral modification agreement].)

## II. DR. SINGH'S CLAIMS OF ERROR

### A. The LLC's Operating Agreement

#### *1. Limitations on Contracts and Debt*

The LLC's operating agreement stated the business and affairs of the LLC shall be managed, and the power of the LLC shall be exercised, by or under the direction of the managing member. The operating agreement appointed David Berry as the managing member. This general grant of authority was subject to a dozen restrictions, which identified actions the managing member was not authorized to take without the prior written unanimous consent of the LLC's members. One restriction stated the managing

member could not incur debts to a single creditor on behalf of the LLC in excess of $10,000 or make any expenditure for the purchase of goods or services in a single transaction in excess of $10,000. Another restriction precluded the managing member from "[e]ntering into any contract, agreement, debt, or obligation with … any entity in which the Managing Member, his or her spouse, or any relative by blood or marriage of the Managing Member, owns more than a 5% (five percent); interest."

The observance of the unanimous written consent requirement is illustrated by a resolution signed by the LLC's members on the same day the operating agreement was signed—November 28, 2007. The resolution authorized and directed David Berry to sign a final franchise agreement with Marriott. David Berry signed the Springhill Suites by Marriott Franchise Agreement on behalf of the LLC on December 17, 2007, and the agreement stated it became effective as of January 14, 2008. No unanimous written consents were signed authorizing the contract between Berry Construction and the LLC or the oral amendments to that contract.

*2. Referee's Findings*

The Referee concluded the restrictions in the operating agreement did not bar Berry Construction's recovery under the contract because (1) Berry Construction was not a party to the operating agreement and any failure to comply with its terms would be chargeable to the members, not a separate entity; (2) this lawsuit was not one of the types of proceedings described in former Corporations Code section 17051, subdivision (d)[4] in which an operating agreement's limitations could be raised; (3) Dr. Singh waived the restrictions; (4) Dr. Singh was estopped from asserting the lack of compliance with the

[4] The events that are the subject of this litigation occurred when the Beverly-Killea Limited Liability Company Act was in effect. (Former Corp. Code, § 17000 et seq.; see Stats. 2012, ch. 419, §§ 19, 20.) The California Revised Uniform Limited Liability Company Act (Corp. Code, § 17701.01 et seq.) became operative on January 1, 2014 (Corp. Code, § 17713.13).

operating agreement; and (5) Dr. Singh ratified and consented to the conduct of the LLC entering into the agreement with Berry Construction.

*3. Waiver of the Requirement*

Dr. Singh contends there is no basis for the Referee's finding that Dr. Singh's conduct bars him from asserting the limitations in the LLC's operating agreement as a defense. Dr. Singh states the waiver claim required Berry Construction to show by clear and convincing evidence that Dr. Singh freely and knowingly gave up his right to require David Berry to obtain a unanimous written consent for expenditures over $10,000. (CACI Nos. 336 [waiver], 4522 [waiver of written approval requirement for additional work].) In Dr. Singh's view, "The evidence at trial established exactly the opposite of what the Referee found."

Despite identifying the Referee's determination as a finding—that is, the resolution of a question of fact—Dr. Singh's briefing fails to (1) identify the applicable standard of review and (2) comply with the basic rules of appellate procedure governing challenges to a finding of fact.

California law defines waiver as the intentional relinquishment or abandonment of a known right or privilege. (*Smith v. Adventist Health System/West* (2010) 182 Cal.App.4th 729, 745.) Under this definition, waiver is based on intent and, thus, presents a question of fact. (*Ibid*.) The intent to waive may be expressed in words, either oral or written, or implied by a party's conduct. (*Ibid*.)

We interpret Dr. Singh's argument that there is "no basis" for the Referee's waiver finding as a challenge to the sufficiency of the evidence to support that finding. A challenge to the sufficiency of the evidence supporting a finding is subject to review under the deferential substantial evidence standard, which has been described by our Supreme Court as follows:

> "Where findings of fact are challenged on a civil appeal, we are bound by the 'elementary, but often overlooked principle of law, that … the power of

> an appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted,' to support the findings below. (*Crawford v. Southern Pacific Co.* (1935) 3 Cal.2d 427, 429 ….) We must therefore view the evidence in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference and resolving all conflicts in its favor in accordance with the standard of review so long adhered to by this court." (*Jessup Farms v. Baldwin* (1983) 33 Cal.3d 639, 660; see *Montebello Rose Co. v. Agricultural Labor Relations Bd.* (1981) 119 Cal.App.3d 1, 21.)

Well-established principles of appellate practice govern how challenges to the sufficiency of the evidence must be presented. Appellants are required to "'summarize the evidence on that point, favorable and unfavorable, and show how and why it is insufficient. [Citation.]' [Citation.] Where a party presents only facts and inferences favorable to his or her position, 'the contention that the findings are not supported by substantial evidence may be deemed waived.'" (*Schmidlin v. City of Palo Alto* (2007) 157 Cal.App.4th 728, 738, italics omitted; see *In re Marriage of Fink* (1979) 25 Cal.3d 877, 887 [appellant "cite[d] only evidence favorable to his position, ignoring all to the contrary. Such briefing is manifestly deficient."]; *Doe v. Roman Catholic Archbishop of Cashel & Emly* (2009) 177 Cal.App.4th 209, 218 [a "party who challenges the sufficiency of the evidence to support a finding must set forth, discuss, and analyze all the evidence on that point, both favorable and unfavorable"]; *Haynes v. Gwynn* (1967) 248 Cal.App.2d 149, 150–151.)

Here, Dr. Singh's brief does not summarize the evidence unfavorable to his position. His description of the evidence is limited to three agreements mentioned by the Referee: (1) a management agreement signed in May 2007; (2) the franchise agreement, which was authorized by a unanimous written consent of the members; and (3) the documents for the construction loan. Dr. Singh argues the Referee's reliance on these documents was misplaced. Dr. Singh's discussion of the waiver issue fails to set forth the evidence favorable to the Referee's finding. As a result, he has failed to comply with the applicable principles of appellate review. (See *Haynes v. Gwynn*, *supra*, 248

Cal.App.2d at p. 151.) It follows that Dr. Singh has failed to carry his burden of establishing the Referee erred in finding Dr. Singh impliedly waived the application of the unanimous written consent requirement to the contract between Berry Construction and the LLC and the amendments to that contract.

Furthermore, the evidence before this court passes muster under the substantial evidence standard of review. Among other things, David Berry and Dr. Singh signed the "ASSIGNMENT OF CONSTRUCTION CONTRACTS," which referred to a construction agreement between Berry Construction and the LLC. It is reasonable to infer that they signed the document believing the construction agreement was a valid contract and, therefore, a proper subject of the assignment. Stated from another perspective, the Referee reasonably rejected the conflicting inference that they believed there was no valid contract and intended to deceive Bank by stating they were assigning a contract that did not exist. The inference that David Berry and Dr. Singh believed there was a valid construction contract between the LLC and Berry Construction supports the further inference that David Berry and Dr. Singh did not intend the unanimous written consent requirement to apply to that contract. Under the applicable rules of appellate review, we must accept these inferences because they are objectively reasonable and favorable to the prevailing party. (See *Jessup Farms v. Baldwin*, *supra*, 33 Cal.3d at p. 660.) Accordingly, the circumstantial evidence in the record constitutes substantial evidence supporting the finding that Dr. Singh's conduct demonstrated a waiver of the unanimous written consent requirement contained in the operating agreement.[5]

B. Mutual Assent

Dr. Singh contends the evidence is clear that the LLC did not have mutual assent regarding the agreement under which Berry Construction built the hotel and restaurant.

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[5] Based on our conclusion regarding waiver, we do not address the alternate grounds of estoppel and ratification. Also, we do not reach the legal issues raised by the Referee's interpretation and application of provisions from the Corporations Code.

Berry Construction contends the execution of the written agreement and its subsequent performance of the agreement establishes mutual assent to the contract.

To the extent Dr. Singh's mutual consent argument is based on the restrictions in the operating agreement, it is rejected because he waived those restrictions. To the extent that Dr. Singh argues the evidence is insufficient to show the LLC consented to the construction contract, we conclude substantial evidence supports the Referee's finding of a written contract with subsequent oral modifications.

First, the document labeled "UNDERSTANDING AND AGREEMENT TO DEVELOP AND CONSTRUCT A HOTEL" and dated January 25, 2008, which David Berry signed on behalf of the LLC and the subsequent reference to that agreement in the "ASSIGNMENT OF CONSTRUCTION CONTRACTS" executed by Dr. Singh and David Berry constitute substantial evidence supporting the finding that the LLC consented to Berry Construction performing the construction on a modified cost-plus basis. Second, the LLC paid many of the invoices submitted to it by Berry Construction. The performance rendered by Berry Construction in building the hotel and restaurant and the performance by the LLC in paying invoices reasonably supports the inference that the entities had given their mutual consent to the construction agreement.

C. Fiduciary Duty

Next, we consider Dr. Singh's argument that David Berry breached his fiduciary duty to Dr. Singh and the LLC. Former Corporations Code section 17153 states that "[t]he fiduciary duties a manager owes to the limited liability company and to its members are those of a partner to a partnership and to the partners of the partnership." Dr. Singh contends this section resulted in David Berry being a fiduciary to him and the LLC. Dr. Singh argues the fiduciary duties required David Berry to fully disclose his dealings and those of his affiliate, Berry Construction, with the LLC. In Dr. Singh's view, the absence of the requisite disclosures caused any contract between the LLC and Berry Construction to be invalid.

The Referee's written decision did not address the argument that David Berry breached his fiduciary duties. Dr. Singh's appellate briefs do not cite any document or transcript in the appellate record showing he raised the breach of fiduciary duties in the proceedings before the Referee.

As a general rule, "'issues not raised in the trial court cannot be raised for the first time on appeal.'" (*Johnson v. Greenelsh* (2009) 47 Cal.4th 598, 603; 9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 400, pp. 458-459 [point not properly raised below].) This general rule is subject to an exception that grants appellate courts the discretion to address questions not raised in the trial court when the theory presented for the first time on appeal involves only a legal question determinable from facts that are (1) uncontroverted in the record and (2) could not have been altered by the presentation of additional evidence. (*Esparza v. KS Industries, L.P.* (2017) 13 Cal.App.5th 1228, 1237–1238.) Here, we conclude the alleged breach of fiduciary duties involves questions of fact and the evidence relevant to those questions allows for conflicting inferences to be drawn about the disclosures made to Dr. Singh[6] and the amount of detail he was willing to consider. Consequently, the general rule, rather than the exception, applies to the argument that David Berry breached his fiduciary duties. Accordingly, we will not consider that newly raised argument.

D. Uncertainty and Missing Contractual Terms

The formation of an enforceable contract requires the agreed-upon terms to be sufficiently definite that the performance promised is reasonably certain. (*Codemasters*, *supra*, 104 Cal.App.4th at p. 141 [formation of a contract requires certainty]; 1 Witkin, Summary of Cal. Law (11th ed. 2017) Contracts, § 137, pp. 177–178 [requirement of certainty].) A contractual term is reasonably certain when it provides a basis for (1)

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**6** The Referee explicitly found a number of changes were made to the project that increased its cost and "Dr. Singh knew that [Berry Construction] had made numerous substantive changes to the project."

determining the existence of a breach and (2) giving an adequate remedy. (*Codemasters*, *supra*, at p. 141; Rest.2d Contracts, § 33, subd. (2).) Stated another way, where the terms are so uncertain and indefinite that the intention of the parties as to material particulars cannot be ascertained, the agreement is not enforceable. (*Robinson & Wilson, Inc. v. Stone* (1973) 35 Cal.App.3d 396, 407 [construction contract, as interpreted by the trier of fact, was not enforceable because it was indefinite and uncertain as to scope of the work contemplated in certain portions of the building; no plans for the design of the interior of those portions existed].)

Here, Dr. Singh contends so many material terms were missing from the written agreement to construct a hotel that a valid contract was never formed by the parties. Dr. Singh argues there was absolutely no evidence as to how the cost of the project was to be calculated and what the LLC's obligations were under the agreement.

The general point that many terms were missing from the *written* agreement does not establish reversible error because those terms could have been the subject of an oral amendment or, alternatively, the uncertainty could have been eliminated by Berry Construction's building the hotel and restaurant and the LLC's acceptance of that performance. Dr. Singh's arguments about uncertainty is undermined by the principle that "[p]art performance under an agreement may remove uncertainty and establish that a contract enforceable as a bargain has been formed." (Rest.2d Contracts, § 34, subd. (2).) Here, any uncertainty about exactly what was to be built pursuant to the contract has been removed by the completion of the hotel and restaurant.

The more specific point made by Dr. Singh relates to the uncertainty of the LLC's obligation—specifically, how much it was to pay for the construction. This claim of uncertainty is addressed by the Referee's findings that there was no agreement in advance on the final cost of the project and Berry Construction was to be paid on a modified cost-plus basis. The Referee found the modified cost-plus formula required Berry Construction to be paid for all costs incurred in connection with the project, including

burden on labor for work actually provided, but without charges for home office overhead or profit. Dr. Singh's brief does not discuss the evidence that supports this finding. That evidence includes the testimony of Todd Phillips and the contents of the document labeled "UNDERSTANDING AND AGREEMENT TO DEVELOP AND CONSTRUCT A HOTEL" and dated January 25, 2008. (See *Haynes v. Gwynn*, *supra*, 248 Cal.App.2d at p. 151 [appellant did not discuss evidence favorable to the findings and, thus, failed to carry the burden of establishing error].) For example, inferences reasonably drawn from the written document support the modified cost-plus approach and the exclusion of home office overhead and profit. One sentence in the document refers to "building a facility at the best possible cost for value received" and the three-page attachment provided estimated costs for over 100 items with the lines for "Overhead" and "Profit" left blank. The fact no amounts were entered on the lines for overhead and profit supports the inference that the parties did not intend the LLC to pay for those items. The estimated amounts for the other items support the inference that the parties intended the LLC to pay the costs associated with those items. Accordingly, we conclude substantial evidence supports the Referee's finding that the LLC was obligated to pay for the construction on a cost-plus basis, with exclusions for overhead and profit. This obligation was not so indefinite or uncertain as to be unenforceable. (See *Electrical Contractors, Inc. v. Westwater Farms, LLC* (Utah App. 2016) 370 P.3d 949, 953 [cost-plus terms in oral contract did not establish precise price to be paid, but provided a clear method for calculating the price once the work was completed; essential terms were not uncertain].)

E. Exhibit to Complaint

Dr. Singh argues the breach of contract claim cannot be based on the document attached to the complaint because that document is not the same as the bank loan documents signed by Dr. Singh. Dr. Singh's brief describes the difference between the list of costs in the three-page attachment to the document labeled "UNDERSTANDING

AND AGREEMENT TO DEVELOP AND CONSTRUCT A HOTEL" dated January 25, 2008, and line items included in the letter of understanding prepared on Bank letterhead, dated May 27, 2008, and signed by David Berry, Patricia Berry and Dr. Singh.

Dr. Singh's argument does not address the trial court's findings that (1) the costs in the attachment to the document dated January 25, 2008, were *estimates* and (2) the contract price was to be determined on a modified cost-plus basis. Based on these findings, which Dr. Singh has not shown are erroneous, the fact that the costs listed in the letter of understanding do not match exactly the earlier estimates does not establish the document dated January 25, 2008, was not part of the contract between Berry Construction and the LLC.

F. Validity of Oral Amendments

Dr. Singh challenges the validity of the alleged oral amendments to the construction contract on the ground they never were submitted to him and, thus, never approved as required by the terms of the LLC's operating agreement. Earlier, we upheld the Referee's finding that Dr. Singh's conduct resulted in an implied waiver of the unanimous written consent requirement set forth in the operating agreement. The finding of waiver also applies to the oral amendments to the construction contract between the LLC and Berry Construction.

III. PREJUDGMENT INTEREST

A. General Principles

*1. Statute*

Civil Code section 3287, subdivision (a) provides: "A person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested the person upon a particular day, is entitled also to recover interest thereon from that day, except when the debtor is prevented by law, or by the act of the creditor from paying the debt." Courts use the shorthand term "liquidated" to mean certain, or capable of being made certain by calculation. Under subdivision (a) of

the statute, a trial court has no discretion—it must award prejudgment interest from the first day there exists both a breach of the contract and a liquidated claim. (*Watson Bowman Acme Corp. v. RGW Construction, Inc.* (2016) 2 Cal.App.5th 279 [supplier's contract claim against general contractor for expansion joints used in highway overpass construction was sufficiently certain for an award of prejudgment interest] (*Watson Bowman*).)

Civil Code section 3287, subdivision (b) addresses the award of prejudgment interest on unliquidated contract claims: "Every person who is entitled under any judgment to receive damages based upon a cause of action in contract where the claim was unliquidated, may also recover interest thereon from a date prior to the entry of judgment as the court may, in its discretion, fix, but in no event earlier than the date the action was filed." This provision grants trial courts the discretion to award prejudgment interest and determine the date from which interest runs. (*North Oakland Medical Clinic v. Rogers* (1998) 65 Cal.App.4th 824, 829 (*North Oakland*).)

Prejudgment interest, whether discretionary or mandatory, is treated as an element of damages, not a cost of litigation. (*North Oakland, supra*, 65 Cal.App.4th at p. 830.) It compensates the plaintiff for the loss of the use of property or money during the period before the judgment is entered. (*Id*. at p. 828.)

*2. The Certainty Requirement*

The statute's certainty requirement is based in part on an equitable consideration—that it is unfair to require a defendant to pay interest when the defendant does not know what sum is owed. (*Chesapeake Industries, Inc. v. Togova Enterprises, Inc.* (1983) 149 Cal.App.3d 901, 906.) Thus, the mandatory prejudgment interest is assessed only when the defendant knows or can calculate the amount owed and does not pay. In *Chesapeake*, the court acknowledged the tension between compensating the plaintiff's loss and fairness to the defendant, stating:

> "These competing policy considerations have led the courts to focus on the defendant's knowledge about the amount of the plaintiff's claim. The fact the plaintiff or some omniscient third party knew or could calculate the amount is not sufficient. The test we glean from prior decisions is: did the defendant actually know the amount owed or from reasonably available information could the defendant have computed that amount. Only if one of those two conditions is met should the court award prejudgment interest." (*Id*. at p. 907, italics omitted.)

Under this test for certainty as to amount, it is well established that a dispute or denial of *liability* does not make the *amount of damages* uncertain. (*Wisper Corp. v. California Commerce Bank* (1996) 49 Cal.App.4th 948, 958.) Our Supreme Court stated: "Generally, the certainty required of Civil Code section 3287, subdivision (a), is absent when the amounts due turn on disputed facts, but not when the dispute is confined to the rules governing liability." (*Olson v. Cory* (1983) 35 Cal.3d 390, 402 (*Olson*).) In *Olson*, the court determined the salary and pension benefits owed to the members of the plaintiff class were readily calculable amounts for purposes of awarding prejudgment interest. (*Id*. at p. 402.)

Even disputes about the amount owed do not necessarily establish the damages are uncertain. Our Supreme Court has "held that even a dispute as to the *amount* of alleged damages (from an earthquake) did not prevent those damages from 'being made certain by calculation' within the meaning of [Civil Code] section 3287 where the amount of recovery closely approximated plaintiff's claims." (*Leff v. Gunter* (1983) 33 Cal.3d 508, 520 (*Leff*).) In *Leff*, a readily ascertainable value of the plaintiff's share of a development project was established by (1) the difference between (a) an uncontested appraisal of the completed building and (b) the amount of the mortgage against the property (2) divided by plaintiff's conceded one-sixth share in the original venture. (*Id*. at p. 519.) The court noted, "Defendants offered no evidence to contradict [the] valuations" of the three components used to calculate damages. (*Id*. at p. 520.) Consequently, the court reversed the trial court's denial of prejudgment interest and remanded the case for the calculation and award of such interest. (*Id*. at pp. 520–521.)

This court has interpreted our Supreme Court's decisions as supporting the principle that the manner in which a case is litigated can affect the ultimate resolution of the certainty question. (*Watson Bowman, supra,* 2 Cal.App.5th at p. 294; see *Olson, supra,* 35 Cal.3d at p. 402 [amounts due were readily calculable]; *Leff, supra,* 33 Cal.3d at p. 520 [no evidence contradicted components used in plaintiff's calculations and recovery closely approximated plaintiff's claims].) In situations where the defendant does not know and, based on the information reasonably available to him or her, cannot readily compute the amount of damages, that amount might be rendered capable of calculation by the plaintiff supplying a statement and supporting data that allows the defendant to ascertain the amount of the damages. (*Polster, Inc. v. Swing* (1985) 164 Cal.App.3d 427, 435.)

*3. Construction Contracts and Extra Work*

The certainty requirement has been applied to the amount owed under construction contracts for extra work or changes in the work. Such contracts might state the amount owed is (1) based on a cost-plus formula, (2) the reasonable value of the extra work done, or (3) based on the agreement of the parties. (*Watson Bowman, supra,* 2 Cal.App.5th at p. 295; see *Macomber v. State* (1967) 250 Cal.App.2d 391, 401.) Here, cases involving cost-plus contracts are the most relevant. Often, a cost-plus formula permits the damages to be made certain by calculation and, in such situations, prejudgment interest is recoverable. (*Anselmo v. Sebastiani* (1933) 219 Cal. 292, 301–303; *Schmidt v. Waterford Winery, Ltd.* (1960) 177 Cal.App.2d 28, 34 [amount due "might be made certain by reference to well-established value plus computation"].) In comparison, where the contract entitles the plaintiff to no more than the reasonable value of the extra work done, that value usually is ascertained by the trier of fact after considering conflicting evidence. (*Macomber v. State, supra,* at p. 401.) In those cases, damages are regarded as unliquidated and prejudgment interest is not mandatory. (*Ibid.*)

*4. Standard of Review*

When a challenge to an award of prejudgment interest presents pure questions of law, we independently review the resolution of those questions of law. (*City of Clovis v. County of Fresno* (2014) 222 Cal.App.4th 1469, 1477.) The trial court's determination of whether and when the plaintiff's damages were made certain or capable of being made certain by calculation are subject to independent review where the facts are not in dispute or, alternatively, have been established by findings of the trial court supported by substantial evidence. (*Watson Bowman, supra*, 2 Cal.App.5th at p. 296; *KGM Harvesting Co. v. Fresh Network* (1995) 36 Cal.App.4th 376, 390–391.) Phrased another way: "On appeal, we independently determine whether damages were ascertainable for purposes of the statute, absent a factual dispute as to what information was known or available to the defendant at the time." (*Collins v. City of Los Angeles* (2012) 205 Cal.App.4th 140, 151.)

B. Award of Mandatory Prejudgment Interest

*1. Trial Court's Decision*

The Referee found the sum due from the LLC to Berry Construction was certain as of February 7, 2012, and awarded prejudgment interest from that date. The Referee relied on the part of the statute referring to damages "capable of being made certain by calculation" (Civ. Code, § 3287, subd. (a)) and explicitly found Berry Construction "provided Dr. Singh with statements and data which were sufficiently detailed to allow Dr. Singh to have computed the amount of damages owed by no later than February 7, 2012." The Referee also stated:

> "Dr. Singh, a member of the LLC, steadfastly refused to allow the LLC to make any payment to [Berry Construction] notwithstanding that all of [Berry Construction's] records were made available to Dr. Singh and his counsel years ago, and Dr. Singh could have requested copies of such records under Corporations Code § 1706. Dr. Singh offered absolutely no testimony at trial from his own expert about the costs claimed by [Berry Construction], offered no evidence to support any claims of defalcation or wrongdoing by [Berry Construction's] former employee Pablo Aleman, and

> offered no testimony to rebut that of Messrs. Phillips and Gonzales concerning the costs actually incurred by [Berry Construction]."

The Referee's description of the legal principles governing the award of prejudgment interest referred to *Worthington Corp. v. El Chicote Ranch Properties, Ltd.* (1967) 255 Cal.App.2d 316, and *Maurice L. Bein, Inc. v. Housing Authority* (1958) 157 Cal.App.2d 670. In *Bein*, the court stated: "It has frequently been held that the defendant will be charged with interest for his failure to pay the plaintiff's claim where he has been supplied by invoice or statement with the data necessary to determine the amount due. [Citation.]" (*Bein, supra,* at p. 686; see *Worthington Corp., supra,* at p. 323.) The Referee also stated cost-plus construction contracts "are included in the types of contracts where the sums due are sufficiently certain that prejudgment interest can be awarded" and cited *Anselmo v. Sebastiani, supra,* 219 Cal. at p. 301, and *Bein, supra,* at pages 686–688 as examples.

*2. Dr. Singh's Contentions*

Dr. Singh contends there is no factual basis for the award of prejudgment interest and argues the Referee's certainty "finding does not comport with California law." Dr. Singh compares the $2,758,937.42 in damages requested in the complaint to the Referee's finding that the amount due under the contract was $2,263,555.82. He notes the difference is nearly $500,000 or 22 percent of the amount awarded. Dr. Singh argues the difference qualifies as a large discrepancy and establishes the damages were unliquidated prior to the trial. (See *Polster, Inc. v. Swing, supra,* 164 Cal.App.3d at p. 435 ["a large discrepancy between the amount of damages demanded in the complaint and the size of the eventual award … militates against a finding of … certainty"].)

*3. Chronology of Amount Claimed as Due*

*July 2009*: The LLC issues a $40,000 check to pay Berry Construction's invoice. The invoice was the last one Berry Construction submitted to the LLC, and the payment

was the last one made by the LLC. The invoices, and the LLC's payments under the invoices, totaled $8,131,568.

*October 2010*: The LLC's construction loan with Bank is paid down to $5 million and converted to a permanent loan.

*October 2011*: Attorneys representing David Berry and Berry Construction send a demand letter to Dr. Singh stating "Mr. Berry ended up paying $3,500,000 in order to restructure the loan" and "incurred $1,000,000 constructing the [restaurant] and is still owed $1,000,000 from the construction of the Hotel." At this point, the claim for unpaid construction work was roughly $2 million.

*January 2012*: Dr. Singh's attorney sends a response letter (1) questioning why costs incurred on the project were so high and (2) referring to an embezzlement by one of Mr. Berry's employees. The letter stated Dr. Singh's belief that the embezzlement may be the source of much of the increased costs attributed to the hotel and noted Dr. Singh had asked for a copy of the external audit of the embezzlement, which David Berry refused to provide. The letter also stated Dr. Singh had asked for an accounting of the construction costs associated with the hotel and, "[i]nstead of providing a cost breakdown and accounting, Mr. Berry simply provided several hundred pages of incomprehensible general ledger printouts."

*February 2012*: The attorney representing Berry Construction responded to the letter from Dr. Singh's attorney. The response did not identify a specific amount that Berry Construction claimed it was owed, but stated "that the approximate cost of the construction and tenant improvements for the [restaurant] was $1,000,000" and "the total costs associated with the development and construction of the hotel would be approximately $8,838,000." Included with the letter were documents labeled "JOB TRANS DETAIL HISTORY REPORT" listing the costs incurred by Berry Construction for the hotel project (102 pages), the hotel start-up (1 page), the construction of the restaurant (35 pages), and the tenant improvements for the restaurant (26 pages). A total

cost was provided at the end of each cost history report. Those totals were $9,838,435.41 (hotel construction), $70,641.62 (hotel start-up costs), $423,876.03 (restaurant construction), and $557,551.66 (tenant improvements). The sum of these figures is $10,890,504.72.

*March 2013*: Berry Construction filed a complaint against the LLC for damages. The breach of contract cause of action alleged: "The total amount of the amended contract to which the parties agreed was $10,890,504.72. Defendants have paid [Berry Construction] only the sum of $8,131,567.30, leaving a balance due as of July 1, 2009 in the amount of $2,758,937.42." The prayer in the complaint repeated this figure by requesting "damages in the principal amount of $2,758,937.42" and prejudgment interest from July 1, 2009. Berry Construction's calculation of the balance owed is consistent with the costs listed in the four cost history reports provided with the February 7, 2012, letter.

*July 2014*: Berry Construction's responses to the first set of form interrogatories propounded by Dr. Singh state that its damages are the "principal sum of $2,758,937.42 plus prejudgment interest at 10% and costs of suit." This principal amount is the same as the principal amount stated 16 months earlier in the complaint.

*January 6, 2017*: Berry Construction's opening trial brief repeated the amount claimed in its complaint and interrogatory response by asserting "$2,758,936.72, plus interest, remains due and owing from the LLC to Berry Construction."

*January 9, 2017*: During the first day of trial before the Referee, Berry Construction presented the testimony of its construction cost and accounting expert, Anthony Gonzales. Gonzales's powerpoint slides (trial exhibit 193) showed his determination of the actual cost for the design and construction of the hotel at $9,388,028, a figure that excluded overhead, home office supervision, insurance, loan fees and profit. During his testimony, Gonzales was asked to explain why his actual cost figure was almost half a million dollars less than the $9,838,435.41 at the end of the cost

history report (trial exhibit 80) for the hotel construction. He stated, "in looking at the agreement, we had removed the overhead, the home office supervision and the profit from that, insurance and loan fees and so forth. So we had to remove those from the actual cost in order to get an apples to apples comparison." Gonzales then compared his actual cost figure to Berry Construction's estimated budget amount of $8,555,459.[7]

*January 11, 2017*: On the last day of the trial, Gonzales was recalled to testify about adjustments made to the costs listed in the cost history reports for the restaurant construction (trial exhibit 81) and the tenant improvements to the restaurant (trial exhibit 82). The total amount stated in the cost history report for the construction of the restaurant's shell was $423,876.03 and Gonzales reduced this figure by $19,984.00 to get an actual cost of $403,892.03. Gonzales stated the reduction removed home office overhead. The cost history report for the tenant improvements totaled $557,551.66 and Gonzales reduced that figure by $24,989.49 for home office overhead and got what he described as "a new actual cost" for the tenant improvements of $532,562.17.

*4. Analysis of the Certainty of the Damages*

Whether an amount owed under the contract is sufficiently certain for purposes of awarding prejudgment interest must be evaluated in the context of not only the historical facts that occurred before the litigation, but also the claims asserted, arguments made, and evidence presented during the course of the litigation. (See *Watson Bowman*, *supra*, 2 Cal.App.5th at p. 301.) For instance, a large discrepancy between the amount of damages demanded in the complaint and the size of the eventual award tends to show the damages lacked the certainty required by Civil Code section 3287, subdivision (a). (*Wisper Corp.*

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[7] Gonzales concluded the increase in costs over the estimated amounts were reasonable because (1) the design was not completed when the budget was estimated, (2) additional work was added to the project after the budget was developed, and (3) Berry Construction's actual cost of general conditions was within the range of industry standards. His opinion about reasonableness is not relevant to the issues raised in this appeal.

*v. California Commerce Bank, supra,* 49 Cal.App.4th at p. 961.) The greater the disparity between the complaint and the damages awarded, the less likely prejudgment interest is appropriate. (*Ibid*.; 12 Miller & Starr, Cal. Real Estate (4th ed. 2018) § 40:32, p. 40-132.)

Here, the $2,758,937.42 claimed in Berry Construction's March 2013 complaint was consistent with the cost totals contained in the four cost history reports included with its February 7, 2012, letter to Dr. Singh's attorney. Over the next three years and 10 months, Berry Construction consistently claimed it was owed $2,758,937.42. The Referee found the unpaid balance of the contract was $2,263,555.82. This disparity of $495,381.60 reflects the adjustments made by Gonzales and accepted by the trier of fact as appropriate reductions in the amount owed under the contract's cost-plus formula.

In the context of a complaint and opening trial brief requesting approximately $2.7 million in damages, we conclude $0.5 million is a significant reduction in those damages. Furthermore, based on our review of the exhibits and Gonzales's testimony, it would have been difficult for the LLC to predict which entries in the cost history reports Gonzales would conclude were appropriately excluded from the calculation of actual cost. For example, the $19,984.00 adjustment to the cost of constructing the restaurant's shell relates to entries under a variety of cost categories. Gonzales excluded all entries in the cost history report under the cost code "030-193," which is described as "Burden & Overhead." These entries start on May 31, 2007; end on May 6, 2009; cover over five pages of the cost history report; and total $12,844.94. In addition, Gonzales testified he excluded engineering and drafting, cost code 001-011[8]; *part* of the supervision, cost code 001-015; *part* of travel/subsistence, cost code 001-018; *part* of miscellaneous, cost code

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**8** We assume Gonzales excluded only part of this cost code—specifically, the $6,793.07 assigned to labor—and did not exclude the $41,278.87 for various subcontracts. The subcontracts are more than double the size of Gonzales's adjustment and, therefore, it is mathematically impossible for them to constitute part of the adjustment.

017-177; property management, cost code 866-000; and wages, cost code 855-000. The entries under these six additional cost codes total $16,616.82. Thus, Gonzales's total exclusion of $19,984 included less than half of the dollar amounts listed under these cost codes.[9]

The LLC did not have enough information available to it to make the same partial exclusions that Gonzales made in his calculation, especially in view of the fact that the amount claimed in Berry Construction's opening trial brief did not make any of the exclusions adopted by Gonzales. In short, uncertainty about the adjustments to the totals provided in the cost history reports rendered the calculation of the total damage uncertain. Therefore, we conclude that in February 2012 the amount due under the construction contract was not "capable of being made certain by calculation" for purposes of Civil Code section 3287, subdivision (a). Accordingly, the award of prejudgment interest starting on February 7, 2012, must be reversed.

*5. Discretionary Prejudgment Interest*

The Referee's written decision stated that "even if it were to have been determined that the damages were not certain or capable of being made certain, the Referee would have exercised his discretion to award prejudgment interest under Civil Code § 3287(b) from March 19, 2013 [the date of filing the Complaint herein] to March 17, 2017 based on the facts and circumstances of the case and given the policies underlying Civil Code § 3287." To support this exercise of discretion, the Referee found (1) Berry Construction had lost the use of the balance owed, which should have been paid in July 2009 and (2) the delay in payment was caused by troublesome conduct of Dr. Singh, who steadfastly refused to allow the LLC to make further payments despite all of Berry Construction's records being made available to him and his attorney years ago. The Referee noted Dr.

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**9** $19,984 minus $12,844.94 (total "Burden & Overhead) equals $7,139.06, which is about 43 percent of $16,616.82 (i.e., the total of the six other cost codes).

Singh did not offer testimony from an expert about the costs claimed by Berry Construction and did not rebut the testimony of Gonzales or the project manager.

Dr. Singh's appellate briefing does not challenge, or even mention, the Referee's alternate ground for awarding prejudgment interest. We have identified no legal or factual error in the Referee's determinations that (1) discretionary prejudgment interest is appropriate under subdivision (b) of Civil Code section 3287 and (2) it should begin to accrue on the date the complaint was filed. Accordingly, the judgment should be modified to reflect a discretionary award of prejudgment interest from the date of March 19, 2013, which the Referee specified in his alternate finding.

## IV. MOTION TO DISMISS

Berry Construction filed a motion to dismiss the appeal, contending the issues appealed are moot because the LLC satisfied the judgment as part of a compromise. Dr. Singh opposed the motion to dismiss the appeal, contending the judgment was paid to stop the accrual of interest at the rate of nearly $1,000 per day and the agreement about payment of the judgment did not expressly or impliedly include an agreement to settle the issues raised in this appeal.

The effect of paying a judgment on the right to appeal was addressed by the California Supreme Court in *Reitano v. Yankwich* (1951) 38 Cal.2d 1. The court denied the motion to dismiss the appeal, stating "there is no indication the payment of the judgment for costs was by way of compromise or pursuant to an agreement not to prosecute an appeal." (*Id*. at p. 4.) In discussing the loss of the right to appeal, the court quoted the following rule: "'In the case of voluntary satisfaction of a judgment, deprivation of the right to appeal ensues only when it is shown that the payment of the judgment was by way of compromise or with an agreement not to take or prosecute an appeal.'" (*Id*. at p. 3.) The court also noted the right to appeal may be lost "'under circumstances leaving only a moot question for determination.'" (*Id*. at p. 4.)

Here, Berry Construction claims there was a "compromise" and, alternatively, the questions raised on appeal have been mooted by the payment of the judgment. We reject each claim.

First, the questions raised have not been mooted in the sense that the court is unable to provide effective relief. (See *MHC Operating Limited Partnership v. City of San Jose* (2003) 106 Cal.App.4th 204, 214 ["A case is moot when the decision of the reviewing court 'can have no practical impact or provide the parties effectual relief.'"].) Here, the modification of the amount of the judgment based on the adjustment of the date from which prejudgment interest accrued constitutes effectual relief and the LLC will have the right to obtain a refund of the amount overpaid. Berry Construction's argument that money has changed hands and the parties cannot go back and reverse course is factually inaccurate. The LLC's overpayment of money can be easily returned as "'money is fungible.'" (*Small Property Owners of San Francisco v. City and County of San Francisco* (2006) 141 Cal.App.4th 1388, 1401, fn. 6.)

Second, the facts presented do not establish a "compromise." Black's Law Dictionary (10th ed. 2014) provides two definitions of the term. First, "[a]n agreement between two or more persons to settle matters in dispute between them; an agreement for the settlement of a real or supposed claim in which each party surrenders something in concession to the other." (*Ibid*.) Second, "compromise" includes "[a] debtor's partial payment coupled with the creditor's promise not to claim the rest of the amount due or claimed." (*Ibid*.) The facts presented establish neither of these definitions were met. Here, the LLC paid the full amount of the judgment, not a smaller (i.e., compromised) amount.

Accordingly, under the principles adopted by our Supreme Court, Berry Construction has not demonstrated the payment of the judgment resulted in a loss of the LLC's right to appeal.

## DISPOSITION

The judgment is affirmed in part and reversed insofar as it awards prejudgment interest starting on February 7, 2012. The matter is remanded to the trial court to modify the judgment to reflect an award of prejudgment interest starting on March 19, 2013. The parties shall bear their own costs on appeal. Respondent's motion to dismiss, filed on November 3, 2017, is denied.

_____
FRANSON, J.

WE CONCUR:

_____
LEVY, Acting P.J.

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SNAUFFER, J.